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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

ANGEL FRALEY; PAUL WANG; SUSAN)
MAINZER; JAMES H DUVAL, a minor, by and) PLAINTIFFS' MEMORANDUM OF
through JAMES DUVAL, as Guardian ad Litem;) LAW IN SUPPORT OF MOTION TO
and WILLIAM TAIT, a minor, by and through) DISMISS CLAIMS AND WITHDRAW
RUSSELL TAIT, as Guardian ad Litem;) CLASS REPRESENTATIVES
individually and on behalf of all others similarly)
situated;) Case No. CV 11-01726 LHK
Plaintiffs,)
vs.) Hearing: May 31, 2012
FACEBOOK, INC., a corporation and DOES 1 to) Judge: Lucy H. Koh
100, inclusive) Trial Date: December 3, 2012
Defendants.)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
CLAIMS AND WITHDRAW CLASS REPRESENTATIVES
CASE# CV 11-01726 LHK

NOTICE

Notice is hereby given that Plaintiffs will move the Court for an Order allowing the dismissal of claims and withdrawal as class representatives under Fed. R. Civ. P. 41(a)(2) as to Plaintiffs Angel Fraley and Paul Wang. This Motion will be heard by Hon. Lucy H. Koh on May 31, 2012 at 1:30 p.m. in Courtroom 8 of the Northern District of California, San Jose Division, 280 South 1st Street, San Jose, California, or as soon thereafter as it may be heard. This Motion will be based on this Notice and following Memorandum of Law in Support, the Declaration of Steven R. Weinmann, the Declaration of Paul Wang, the Declaration of Angel Fraley and the arguments of counsel.

I. STATEMENT OF ISSUES TO BE DECIDED

Should the Court allow Plaintiffs Angel Fraley and Paul Wang to dismiss their claims against Facebook, Inc. without prejudice and without costs being assessed, and to withdraw as putative class representatives?

II. INTRODUCTION

Plaintiffs Angel Fraley and Paul Wang were among five putative class representatives who filed this class action against Facebook, Inc. in April 2011. Now that the case has progressed and they have been exposed to the discovery demands, they have decided that they no longer wish to be class representatives and would like to dismiss their cases against Facebook. Counsel for Plaintiffs attempted to obtain a stipulation dismissing them from the action, but Counsel for Facebook refused to dismiss the action against them without costs, unless Plaintiffs agreed to Plaintiff Fraley's deposition. Plaintiffs filed a Motion for a Protective Order seeking to prevent her deposition, shortly before filing this Motion, and the former motion is scheduled to be heard by Magistrate Judge Grewal on February 17, 2012.

1 It is a common occurrence for a class representative to decide that they no longer wish
2 to be under the spotlight of class action litigation, subjected to discovery and to have to
3 continue to commit their time to monitoring the prosecution of the action. There are three other
4 class representatives who have already been deposed in advance of the Motion for Class
5 Certification. They each intend to continue to prosecute the suit. Thus, the putative Class'
6 interests are fully protected as the case will go on without Ms. Fraley and Mr. Wang.
7

8 Angel Fraley and Paul Wang have done their duty thus far as putative class
9 representatives, but there is no authority that requires them to continue on if they no longer
10 wish to do so, particularly where the Class' rights are not affected in any way. The dismissal
11 should be without prejudice, as they will simply become absent class members. The posture at
12 the time of this Motion is that the Plaintiffs have prevailed against Facebook's Motion to
13 Dismiss the Complaint, and the Motion for Class Certification has yet to be decided. Thus,
14 there is no reason for the Court to assess any costs against them, as Facebook has not suffered
15 any costs or incurred fees for work that is not equally usable against the other Plaintiffs.
16

17 Plaintiffs accordingly request that Angel Fraley and Paul Wang be allowed to withdraw
18 as class representatives and have their claims dismissed without prejudice. Alternatively,
19 should the Court be inclined to assess costs, they request that their claims be dismissed with
20 prejudice and no costs or fees assessed.
21

22 III. STATEMENT OF FACTS

23 Plaintiffs filed this class action through multiple class representatives on March 11,
24 2011 in the California Superior Court for the County of Santa Clara. Declaration of Steven R.
25 Weinmann, ¶5. Plaintiffs' First Amended Class Action Complaint for Damages was filed on
26 March 18, 2011, also in California Superior Court, and in response to a Motion to Dismiss filed
27
28

1 by Facebook after removal to this Court, a Second Amended Complaint (“SAC”), the operative
 2 complaint, was filed on June 6, 2011. *Id.* The SAC is brought on behalf of a putative Class,
 3 currently defined as:

4 All natural persons in the United States who had an account registered on
 5 facebook.com as of January 24, 2011, and had their names, photographs,
 6 likenesses or identities associated with that account used in a Facebook Sponsored
 7 Stories advertisement (“the Class”).
 8

9 **Subclass of Minors.¹**

10 All persons in the Plaintiff Class who additionally have had their names,
 11 photographs, likenesses or identities used in a Facebook Sponsored Stories ad
 12 while under 18 years of age (“the Minor Subclass”).
 13

14 Excluded from the Class are (a) FACEBOOK, its officers and directors, legal
 15 representatives, successors or assigns; (b) any entity in which FACEBOOK has or
 16 had a controlling interest; (c) the judge to whom this case is assigned and the
 17 judge's immediate family; (d) any juror selected to hear this case.
 18

19 SAC, ¶95.

20 Like the other class members, Ms. Fraley's image was used in Sponsored Stories
 21 advertisements when she clicked a “Like” button associated with her Facebook page. *Id.* at ¶¶
 22 66-68. She was one of the five original class representatives. Weinmann Decl., ¶5. She was
 23 no different than all other class members in any way relating to the substance of the lawsuit and
 24 she did not represent any sub-class within the broader class. Defendant has deposed three of
 25

26
 27 ¹ William Tait and James Duval, who were both under 18 years of age during the relevant time
 28 period, are the class representatives for the minor subclass. Ms. Mainzer is the class
 representative for the class as a whole.

1 the other four class representatives and has now noticed Ms. Fraley's deposition. Weinmann
2 Decl., ¶5. A fourth putative class representative, Paul Wang, has also decided that he does not
3 wish to serve as a class representative. Declaration of Paul Wang, ¶6. Facebook has not sought
4 Mr. Wang's deposition. Weinmann Decl., ¶6.

5 Both Ms. Fraley and Mr. Wang determined that they do not wish to remain as class
6 representatives for numerous reasons, including in the case of Fraley, concerns for her privacy
7 should she be subjected to deposition. Declaration of Angel Fraley, ¶9. Paul Wang has stated
8 that he wishes to step down as class representative because he is required to travel frequently
9 for work. Wang Decl., ¶6. Defendant, however, has refused to stipulate to allow Ms. Fraley
10 and Mr. Wang to be dismissed as the class representatives unless Ms. Fraley's deposition is
11 nevertheless taken. Weinmann Decl., ¶3. The parties met and conferred regarding Ms. Fraley's
12 deposition and the request for dismissal of both Ms. Fraley and Mr. Wang pursuant to Fed. R.
13 Civ. P. Rule 26(c)(1), but could not reach an agreement to resolve the issues. *Id.*

14 Facebook has already taken substantial discovery of the other named Class
15 representative, William Tait, James Duval, and Susan Mainzer. Weinmann Decl., ¶7. They
16 have each had their depositions taken for a full day, and provided all documents requested, as
17 well as responses to written discovery. *Id.*

18 **IV. ARGUMENT**

19 This motion seeks to dismiss the claims of two Plaintiffs who have decided they no
20 longer want to proceed in this action. For the following reasons, they should be permitted to
21 drop their claims without prejudice and without costs. There is no "legal prejudice" to
22 Defendant Facebook, and no costs it has expended that are not equally attributed to the action
23 still being prosecuted by the other named Plaintiffs.

1 **A. Angel Fraley and Paul Wang Are Entitled to Voluntarily Dismiss Their
2 Claims as There Is No Prejudice to Facebook.**

3 Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that courts may allow a
4 plaintiff to be dismissed from an action. Plaintiffs and putative Class representatives Angel
5 Fraley and Paul Wang wish to voluntarily dismiss their actions for personal reasons. “A court
6 should grant a Rule 41(a)(2) motion for voluntary dismissal unless the defendant will ‘suffer
7 clear legal prejudice, other than the prospect of a subsequent suit on the same facts.’” *Gonzalez*
8 *v. Proctor and Gamble Co.*, 2008 U.S. Dist. LEXIS 16872 at *7, quoting *Phillips v. Illinois*
9 *Central Gulf Railroad*, 874 F.2d 984, 986 (9th Cir. 1989). Furthermore, the “Ninth Circuit
10 interprets ‘legal prejudice’ to mean ‘prejudice to some legal interest, some legal claim, some
11 legal argument.’” *Gonzalez*, supra, 2008 U.S. Dist. LEXIS 16872 at *7, quoting *Westlands*
12 *Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). This threshold is not satisfied
13 merely because the defendant would be inconvenienced or where the plaintiff would gain some
14 tactical advantage as a result of the dismissal. *Hamilton v. Firestone Tire & Rubber Co., Inc.*,
15 679 F.2d 143, 145 (9th Cir. 1982). Even if it were a factor, these class representatives are not
16 being withdrawn in aid of gaining a tactical advantage. They simply do not want to continue.
17

18 There is no “legal prejudice” to Facebook as to any such legal interest, legal claim, or
19 legal argument if Ms. Fraley and Mr. Wang are permitted to drop their claims. There is no
20 reason for the Court to demand that these persons continue on litigating a case from which they
21 have decided to withdraw. The class case will continue without them, and Facebook has
22 had and will have ample time in which to prepare a defense.
23

24 There is no authority for forcing a person to continue on as class representative in a
25 class case that they have decided they no longer wish to prosecute, prior to the certification of a
26

1 class. Ms. Fraley and Mr. Wang should be allowed to dismiss their claims, without prejudice,
2 and simply become absent class members if the Class should be certified.

3 Ms. Fraley and Mr. Wang have expressed their reasons for wishing to no longer serve
4 as class representatives. Ms. Fraley has learned that Facebook's lawyers have asked for
5 detailed answers as to the reasons for clicking "Like" on Facebook, as well as other actions
6 taken through the site. Fraley Decl., ¶6 (Weinmann Decl., Ex. 1). Ms. Fraley is thus
7 legitimately concerned that a deposition will subject her to unnecessary annoyance,
8 embarrassment, and intrusion into her private life. Fraley Decl., ¶9. Specifically, Ms. Fraley is
9 concerned because the subject of her deposition will inevitably be the posts and messages she
10 has shared with others through her Facebook page, which is the only interaction she has had
11 involving Defendant. *Id.*

12 Paul Wang travels frequently for business, and became concerned that he would not be
13 able to devote the requisite time to the case. Wang Decl., ¶6. Indeed, he was in Japan for
14 business when he executed his declaration. *Id.* Thus, he also wishes to withdraw as a class
15 representative. *Id.*

16 While the reasons for Ms. Fraley and Mr. Wang are not necessarily relevant under
17 Rule 41 to whether they should be allowed to be withdraw from the case, they also constitute
18 good cause for doing so in the interests of justice.

19 This class action shall continue regardless of the status of these two persons as parties
20 or absent class members, and Plaintiffs will file their Motion for Class Certification on or
21 before March 8, 2012, with Susan Mainzer, William Tait, and James Duval being put forward
22 as the class representatives. Weinmann Decl., ¶7. Facebook's opposition to the class
23 certification motion is due on March 29. Facebook has had full access to each of the three
24

1 persons whom Class Counsel will ask to be appointed class representatives. *Id.* Class Counsel
 2 also notified Facebook's attorneys that Fraley and Wang would not be serving as class
 3 representatives on January 13, 2012. Weinmann Decl., ¶3. As of the filing of this motion, they
 4 have not been deposed, and Facebook has not noticed the deposition of Mr. Wang. *Id.* at ¶6.
 5 As Plaintiffs argued in their Motion for a Protective Order as to Ms. Fraley, she and Mr. Wang
 6 are effectively absent class members, and their experiences are not different from other absent
 7 class members.² There will be no prejudice to Facebook in preparing its opposition to the class
 8 certification motion if they are dismissed from the case, as whether or not their claims are
 9 typical or if they would be adequate class representatives is not relevant.
 10

11 **B. There Is No Prejudice To The Putative Class**
 12

13 This putative class action has not yet been certified, as the Motion for Class
 14 Certification will be filed on or before March 8, 2012 and heard April 12, 2012. As a result,
 15 the requirement under Rule 23(e) of the Federal Rules of Civil Procedure, requiring the Court's
 16 consent to settlement, voluntary dismissal, or compromise as to claims of a "certified class," is
 17 not implicated. Furthermore, this Motion only seeks the dismissal of the claims of Ms. Fraley
 18 and Mr. Wang. There are three other class representatives, Susan Mainzer, William Tait, and
 19 James Duval, and they intend to continue on with the case. Weinmann Decl., ¶7. They bring
 20 all of the same causes of action as did Ms. Fraley and Mr. Wang, and Ms. Mainzer has been
 21 involved since the inception and the other two have been named in the various operative
 22 Complaints since the filing of the First Amended Complaint. *Id.* at ¶5. Thus, there is no
 23 prejudice to any claims of the putative Class.
 24

25
 26
 27 ² The U.S. Supreme Court has repeatedly ruled that Rule 23 class actions are representative
 28 suits and, as such, absent class members may remain passive parties to the class action.
American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974).

1 There is no reason why Angel Fraley and Paul Wang should not be allowed to step
 2 down from their roles as class representatives, and simply be absent class members.

3 **C. The Dismissals Should Be Without Costs**

4 Facebook was willing to stipulate to a dismissal without costs as to both Ms. Fraley
 5 and Mr. Wang, if Plaintiffs had been willing to submit Ms. Fraley for her deposition.
 6 Weinmann Decl., ¶3. There is no reason for Facebook to need to recover any costs if it was
 7 willing to forego them in exchange for Fraley's uncontested deposition. There is also no
 8 prejudice to Facebook in terms of wasted time that would justify the imposition of costs, as all
 9 or the vast majority of Facebook's costs to date were equally applicable to defenses that will be
 10 in play as to the remaining class representatives.

12 Among the factors to be considered in assessing costs or not are whether the
 13 Defendant has incurred effort and expense preparing for trial; the extent to which the litigation
 14 has progressed; the plaintiff's diligence in moving to dismiss; whether awarding costs would
 15 discourage Plaintiffs from seeking early dismissal of actions but instead encourage them to
 16 bring them to trial; and whether the imposition would produce an "anomalous result" where
 17 Defendant could not recover fees if they prevailed at trial. *See Stevedoring Services of America*
 18 *v. Armilla Int'l B.V.*, 889 F.2d 919, 921 (9th Cir. 1989); *Williams v. Peralta*, 227 F.R.D. 538,
 19 540 (N.D. Cal. 2005). Here, none of these factors weigh in favor of an award of costs. Any
 20 costs incurred by Facebook are also associated with the defense of the case generally, as noted,
 21 and thus are neither excessive nor duplicative. An award of costs here would, indeed,
 22 potentially discourage other plaintiffs from dismissing out (or filing in the first place) and any
 23 ability Facebook has to recover its costs should it prevail in the case, will be unaffected since
 24 there are still three other class representatives in the case.

If the Court is nevertheless inclined to grant costs and/or fees, Plaintiffs Ms. Fraley
1 and Mr. Wang request that the dismissals of their claims be with prejudice. A court should
2 generally not award costs and fees if a voluntary dismissal is granted with prejudice. *Gonzalez*,
3 2008 U.S. Dist Lexis 16872 at *8; see *Burnette v. Godshall*, 828 F.Supp. 1439 (N.D. Cal.
4 1993)(no risk of future litigation, so no fees or costs could be awarded). Further, when a
5 plaintiff is faced with the imposition of attorney's fees and costs as a condition for voluntary
6 dismissal, courts have held that a dismissal with prejudice will avoid such payment. See
7 *Horton v. TWA Corp.*, 69 F.R.D. 11 (E.D. N.Y. 1996).

8 Thus, the dismissals should be without costs.

1
2 **V. CONCLUSION**
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5 For all the foregoing reasons, the Motion should be granted and Angel Fraley and Paul
6 Wang permitted to dismiss their actions and step down as class representatives / plaintiffs.
7

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